

COMMONWEALTH OF VIRGINIA
STATE AIR POLLUTION CONTROL BOARD

9 VAC CHAPTER 170.
REGULATION FOR GENERAL ADMINISTRATION.

PART I. DEFINITIONS.

- 9 VAC 5-170-10. Use of terms.
- 9 VAC 5-170-20. Terms defined.

PART II. GENERAL PROVISIONS.

- 9 VAC 5-170-30. Applicability.
- 9 VAC 5-170-40. Hearings and proceedings.
- 9 VAC 5-170-50. Policy and procedural information and guidance.
- 9 VAC 5-170-60. Availability of information.
- 9 VAC 5-170-70. Evaluation of Regulation.

PART III. REGULATIONS AND ORDERS.

- 9 VAC 5-170-80. Establishment of regulations and orders.

PART IV. PUBLIC PARTICIPATION IN REGULATION DEVELOPMENT.

- 9 VAC 5-170-90. General Provisions.
- 9 VAC 5-170-100. Public participation procedures.
- 9 VAC 5-170-110. Transition.

PART V. ENFORCEMENT.

- 9 VAC 5-170-120. Enforcement of regulations, permits, and orders.
- 9 VAC 5-170-130. Right of entry.

PART VI. BOARD ACTIONS.

- 9 VAC 5-170-140. Variances.
- 9 VAC 5-170-150. Local ordinances.
- 9 VAC 5-170-160. Conditions on approvals.
- 9 VAC 5-170-170. Considerations for approval actions.

PART VII. DELEGATION OF AUTHORITY.

- 9 VAC 5-170-180. General Provisions.

PART VIII. APPEAL OF BOARD ACTIONS.

- 9 VAC 5-170-190. General Provisions.
- 9 VAC 5-170-200. Appeal Procedures.

PART I.
DEFINITIONS.

9 VAC 5-170-10. Use of terms.

A. For the purpose of this chapter and subsequent amendments to it, of regulations of the board, or of orders issued by the board, the words or terms shall have the meanings given them in 9 VAC 5-170-20.

B. Unless specifically defined in the Virginia Air Pollution Control Law or in the regulations of the board, terms used shall have the meanings commonly ascribed to them by recognized authorities.

9 VAC 5-170-20. Terms defined.

"Administrative proceeding" means an informal fact finding or formal hearing.

"Administrative Process Act" means Chapter 1.1:1 (§ 9-6.14:1 et seq.) of Title 9 of the Code of Virginia.

"Air pollution" means the presence in the outdoor atmosphere of one or more substances which are or may be harmful or injurious to human health, welfare or safety; to animal or plant life; or to property; or which unreasonably interfere with the enjoyment by the people of life or property.

"Board" means the State Air Pollution Control Board or its designated representative.

"Case decision" means any determination that a named party as a matter of past or present fact, or as a matter of threatened or contemplated private action, either is or is not, or may or may not be (i) in violation of any law or regulations, or (ii) in compliance with any existing requirement for obtaining or retaining a permit or other right or benefit. Case decisions include, but are not limited to, consent orders, consent agreements, orders, special orders, emergency special orders, permits, waivers, and licenses. Case decisions do not include notices of violations, variances, regulations, or inspection reports.

"Confidential information" means secret formulae, secret processes, secret methods or other trade secrets which are proprietary information certified by the signature of the responsible person for the owner to meet the following criteria: (i) information for which the owner has been taking and will continue to take measures to protect confidentiality; (ii) information that has not been and is not presently reasonably obtainable without the owner's consent by private citizens or other firms through legitimate means other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding; (iii) information which is not publicly available from sources other than the owner; and (iv) information the disclosure of which would cause substantial harm to the owner.

"Consent agreement" means an agreement that the owner or another person will

perform specific actions for the purpose of diminishing or abating the causes of air pollution or for the purpose of coming into compliance with the regulations of the board, by mutual agreement of the owner or another person and the board.

"Consent order" means a consent agreement issued as an order. Consent orders may be issued without a formal hearing.

"Department" means an employee or other representative of the Virginia Department of Environmental Quality, as designated by the director.

"Director" means the director of the Virginia Department of Environmental Quality or a designated representative.

"Emergency" means a situation that immediately and unreasonably affects, or has the potential to immediately and unreasonably affect, public health, safety or welfare; the health of animal or plant life; or property, whether used for recreational, commercial, industrial, agricultural, or other reasonable use.

"Emergency special order" means an order of the board issued under the provisions of § 10.1-1309 B of the Code of Virginia, after declaring a state of emergency and without a formal hearing, to owners who are permitting or causing air pollution to cease the pollution. These orders shall become invalid if a formal hearing is not held within 10 days after the effective date.

"Enabling law" or "enabling laws" means provisions of the Constitution and statutes of the Commonwealth of Virginia authorizing the board to make regulations or decide cases or containing procedural requirements therefor, including, but not limited to, the (i) Virginia Air Pollution Control Law and (ii) the Virginia Motor Vehicle Emissions Control Law.

"Evidentiary hearing" means a formal proceeding which provides opportunity for interested persons to submit factual proofs in formal proceedings as provided in § 9-6.14:8 of the Administrative Process Act in connection with the making of regulations. Evidentiary hearings do not include the informational inquiries of an informal nature provided in § 9-6.14:7.1 of the Administrative Process Act.

"Federal Clean Air Act" means 42 USC 7401 et seq., 91 Stat 685.

"Formal hearing" means a formal proceeding which provides for the right of private parties to submit factual proofs as provided in § 9-6.14:12 of the Administrative Process Act in connection with case decisions. Formal hearings do not include the factual inquiries of an informal nature provided in § 9-6.14:11 of the Administrative Process Act.

"Informal fact finding" means an informal conference or consultation proceeding used to ascertain the fact basis for case decisions as provided in § 9-6.14:11 of the Administrative Process Act.

"Locality" means a city, town, county or other public body created by or pursuant to state law.

"Locality particularly affected" means a locality which bears an identified disproportionate material impact which would not be experienced by other localities.

"Order" means a decision or directive of the board, including special orders, emergency special orders, and other orders of all types, rendered for the purpose of diminishing or abating the causes of air pollution or enforcement of the regulations of the board. Unless specified otherwise in the Virginia Air Pollution Control Law or in the regulations of the board, orders shall be issued only after the appropriate administrative proceeding.

"Owner" means a person, including bodies politic and corporate, associations, partnerships, personal representatives, trustees and committees, as well as individuals, who owns, leases, operates, controls or supervises a source.

"Participatory approach" means a method for the use of (i) standing advisory committees, (ii) ad hoc advisory groups or panels, (iii) consultation with groups or individuals registering interest in working with the department, or (iv) a combination of these in the formation and development of regulations for department consideration. When an ad hoc advisory group is formed, the group shall include representatives of the regulated community and the general public. The decisions as to the membership of the group shall be at the discretion of the director.

"Party" means, for the purposes of Part VIII (9 VAC 5-170-190 et seq.), a person named in the record who actively participates in the administrative proceeding or offers comments through the public participation process. The term "party" also means the department.

"Person" means an individual, corporation, partnership, association, a governmental body, a municipal corporation, or another legal entity.

"Pollutant" means a substance the presence of which in the outdoor atmosphere is or may be harmful or injurious to human health, welfare or safety, to animal or plant life, or to property, or which unreasonably interferes with the enjoyment by the people of life or property.

"Public hearing" means, unless indicated otherwise, an informal proceeding, similar to that provided for in § 9-6.14:7.1 of the Administrative Process Act, held to afford people an opportunity to submit views and data relative to a matter on which a decision of the board is pending.

"Public meeting" means an informal proceeding conducted by the department in conjunction with the notice of intended regulatory action to afford people an opportunity to

submit comments relative to intended regulatory actions.

"Public participation process" means any element of a board or department decision making process that involves the use of a public meeting, public hearing or evidentiary hearing.

"Regulations of the board" means regulations adopted by the State Air Pollution Control Board under a provision of the Code of Virginia.

"Source" means one or combination of the following: buildings, structures, facilities, installations, articles, machines, equipment, landcraft, watercraft, aircraft or other contrivances which contribute, or may contribute, either directly or indirectly to air pollution. An activity by a person that contributes, or may contribute, either directly or indirectly to air pollution, including, but not limited to, open burning, generation of fugitive dust or emissions, and cleaning with abrasives or chemicals.

"Special order" means an order of the board issued:

1. Under the provisions of § 10.1-1309 of the Code of Virginia:
 - a. To owners who are permitting or causing air pollution to cease and desist from the pollution;
 - b. To owners who have failed to construct facilities in accordance with or have failed to comply with plans for the control of air pollution submitted by them to, and approved by the board, to construct facilities in accordance with or otherwise comply with the approved plan;
 - c. To owners who have violated or failed to comply with the terms and provisions of an order or directive issued by the board to comply with the terms and provisions;
 - d. To owners who have contravened duly adopted and promulgated air quality standards and policies to cease and desist from the contravention and to comply with the air quality standards and policies; and
 - e. To require an owner to comply with the provisions of the Virginia Air Pollution Control Law and a decision of the board; or
2. Under the provisions of § 10.1-1309.1 of the Code of Virginia, which require that an owner file with the board a plan to abate, control, prevent, remove, or contain a substantial and imminent threat to public health or the environment that is reasonably likely to occur if the source ceases operations.

"Variance" means the temporary exemption of an owner or other person from the regulations of the board, or a temporary change in the regulations of the board as they

apply to an owner or other person.

"Virginia Air Pollution Control Law" means Chapter 13 (§ 10.1-1300 et seq.) of Title 10.1 of the Code of Virginia.

"Virginia Motor Vehicle Emissions Control Law" means Article 22 (§ 46.2-1176 et seq.) of Chapter 10 of Title 46.2 of the Code of Virginia.

"Virginia Register Act" means Chapter 1.2 (§ 9-6.15 et seq.) of Title 9 of the Code of Virginia.

PART II. GENERAL PROVISIONS.

9 VAC 5-170-30. Applicability.

A. The provisions of this chapter, unless specified otherwise, shall apply throughout the Commonwealth of Virginia.

B. The provisions of this chapter, unless specified otherwise, shall apply in the administration of all regulations of the board to the extent not covered in a specific regulation of the board. In cases where the provisions of this chapter conflict with another regulation of the board, the provisions of the other regulation shall apply.

C. No provision of this chapter shall limit the power of the board to take appropriate action as necessary to control and abate air pollution in emergency situations.

D. By the adoption of this chapter, the board confers upon the department the administrative, enforcement, and decision-making authority articulated in this chapter except as restricted in 9 VAC 5-170-220.

9 VAC 5-170-40. Hearings and proceedings.

A. Four types of proceedings are used in the administration of the board's regulatory program.

1. A public hearing is held in each of two situations, as explained below.

a. A public hearing is required before considering regulations, in accordance with § 10.1-1308 of the Virginia Air Pollution Control Law. The procedure for a public hearing shall conform to § 9-6.14:7.1 of the Administrative Process Act, except as modified by §§ 10.1-1307 F and 10.1-1308 of the Virginia Air Pollution Control Law, and to Part IV (9 VAC 5-170-90 et seq.) of this chapter.

b. A public hearing is required before considering variances and

amendments to and revocation of variances, in accordance with § 10.1-1307 C of the Virginia Air Pollution Control Law. The procedure for a public hearing shall conform to § 10.1-1307 C of the Virginia Air Pollution Control Law and to the provisions of 9 VAC 5-170-140.

2. An informal fact finding is used to negotiate and to make case decisions. The procedure for an informal fact finding shall conform to § 9-6.14:11 of the Administrative Process Act.

3. A formal hearing is held in each of two situations.

a. A formal hearing is held for the enforcement or review of orders and permits and for the enforcement of regulations, in accordance with § 10.1-1307 D and § 10.1-1322 A of the Virginia Air Pollution Control Law. The procedures for this type of hearing shall conform to § 9-6.14:12 of the Administrative Process Act, except as modified by § 10.1-1307 D and F of the Virginia Air Pollution Control Law.

b. A formal hearing is held for special orders or emergency special orders for the enforcement or review of orders and permits and for the enforcement of regulations, in accordance with § 10.1-1309 of the Virginia Pollution Control Law. The procedures for this type of hearing shall conform to § 9-6.14:12 of the Administrative Process Act, except as modified by §§ 10.1-1307 F and 10.1-1309 of the Virginia Air Pollution Control Law.

4. An evidentiary hearing may be held for the making of regulations. The procedure for this type of hearing shall conform to § 9-6.14:8 of the Administrative Process Act.

B. The board may adopt policies and procedures to supplement the statutory procedural requirements for the various hearings and proceedings cited in subsection A of this section.

C. Records of hearings and proceedings may be kept in one of the following forms:

1. Oral statements or testimony at a public hearing will be stenographically or electronically recorded, and may be transcribed to written form.

2. Oral statements or testimony at an informal fact finding will be stenographically or electronically recorded, and may be transcribed to written form.

3. Formal hearings and evidentiary hearings will be recorded by a court reporter or electronically recorded for transcription to written form.

D. Availability of records of hearings and proceedings shall be as follows:

1. A copy of the electronic recording or the transcript of a public hearing, if transcribed, will be provided within a reasonable time to anyone upon receipt of a written request and payment of the cost; if not transcribed, the additional cost of preparation will be paid by the person making the request.

2. A copy of the electronic recording or the transcript of an informal fact finding, if transcribed, will be provided within a reasonable time to anyone upon receipt of a written request and payment of cost; if not transcribed, the additional cost of preparation will be paid by the person making the request.

3. Anyone desiring a copy of the transcript of a formal hearing or evidentiary hearing recorded by a court reporter may purchase the copy directly from the court reporter; if not transcribed, the additional cost of preparation will be paid by the person making the request.

9 VAC 5-170-50. Policy and procedural information and guidance.

A. The director may adopt detailed policies and procedures which:

1. Request data and information in addition to and in amplification of the provisions of the regulations of the board;

2. Specify the methods and means that may be used to determine compliance with applicable provisions of the regulations of the board;

3. Set forth the format by which all data and information should be submitted; and

4. Set forth how the regulatory programs should be implemented.

B. In cases where the regulations of the board specify that procedures or methods shall be approved by, acceptable to or determined by the board or other similar phrasing, the owner may request information and guidance concerning the proper procedures and methods, and the director shall furnish in writing such information on a case-by-case basis.

9 VAC 5-170-60. Availability of information.

A. Emission data in the possession of the board shall be available to the public without exception.

B. Other records, reports, or information in the possession of the board shall be available to the public with the following exception. The board shall consider records, reports, or information confidential in accordance with §§ 10.1-1314 and 10.1-1314.1 of the Virginia Air Pollution Control Law upon a showing satisfactory to the board by an owner that records, reports, or information meet the criteria in subsection C of this section

and the owner provides a certification to that effect signed by a responsible representative of the owner. Records, reports or information may be disclosed, however, to other officers, employees or authorized representatives of the Commonwealth of Virginia and the U.S. Environmental Protection Agency concerned with carrying out the provisions of the Virginia Air Pollution Control Law and the federal Clean Air Act.

C. In order to be exempt from disclosure to the public under subsection B of this section, the record, report or information must satisfy the following criteria:

1. Information for which the owner has been taking and will continue to take measures to protect confidentiality;
2. Information that has not been and is not presently reasonably obtainable without the owner's consent by private citizens or other firms through legitimate means other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding;
3. Information which is not publicly available from sources other than the owner; and
4. Information the disclosure of which would cause substantial harm to the owner.

D. The board shall have the right to substitute information which is not confidential for information claimed as confidential and to inquire as to the basis of the confidentiality claim. Upon approval of the board, an owner may substitute information which is not confidential for information claimed as confidential. Information substituted shall be limited to that which would have the same substantive effect in analyses conducted by the board as the information for which the inquiry is made.

E. The responsible representative of the owner who certifies information as confidential which does not meet the criteria in subsection C of this section shall be in violation of the Virginia Air Pollution Control Law.

9 VAC 5-170-70. Evaluation of Regulation.

A. Prior to January 1, 2001, the department shall perform an analysis on this chapter and provide the board with a report on the results. The analysis shall include (i) the purpose and need for the chapter, (ii) alternatives which would achieve the stated purpose of this chapter in a less burdensome and less intrusive manner, (iii) an assessment of the effectiveness of this chapter, (iv) the results of a review of current state and federal statutory and regulatory requirements, including identification and justification of requirements of this chapter which are more stringent than federal requirements, and (v) the results of a review as to whether this chapter is clearly written and easily understandable by affected entities.

B. Upon review of the department's analysis, the board shall confirm the need to (i) continue this chapter without amendment, (ii) repeal this chapter, or (iii) amend this chapter. If the board's decision is to repeal or amend this chapter, the board shall authorize the department to initiate the applicable regulatory process to carry out the decision of the board.

PART III. REGULATIONS AND ORDERS.

9 VAC 5-170-80. Establishment of regulations and orders.

A. Regulations of the board shall be adopted, amended or repealed in accordance with the provisions of the enabling laws, Articles 1 (§ 9-6.14:4.1 et seq.) and 2 (§ 9-6.14:7.1 et seq.) of the Administrative Process Act, and Part IV (9 VAC 5-170-90 et seq.) of this chapter.

B. Regulations, amendments, and repeals shall become effective as provided in § 9-6.14:9.3 of the Administrative Process Act.

C. If necessary in an emergency situation, the board may adopt, amend or stay a regulation as an exclusion under § 9-6.14:4.1 of the Administrative Process Act, but the regulation shall remain effective no longer than one year unless readopted following the requirements of subsection A of this section. The provisions of this subsection are not applicable to emergency special orders of the board; these orders are subject to the provisions of subsection E of this section.

D. The Administrative Process Act and Virginia Register Act provide that state regulations may incorporate documents by reference. Throughout the regulations of the board, documents of the types specified below have been incorporated by reference.

1. United States Code.
2. Code of Virginia.
3. Code of Federal Regulations.
4. Federal Register.
5. Technical and scientific reference documents.

Additional information on specific documents which have been incorporated by reference and on the availability of these documents may be found in the specific regulations of the board which incorporate the documents.

E. Orders, special orders, and emergency special orders may be issued pursuant to § 10.1-1307 D, § 10.1-1309, or § 10.1-1309.1 of the Virginia Air Pollution

Control Law.

PART IV.
PUBLIC PARTICIPATION IN REGULATION DEVELOPMENT.

9 VAC 5-170-90. General Provisions.

A. The procedures in 9 VAC 5-170-100 shall be used for soliciting the input of interested people in the formation and development, amendment or repeal of regulations in accordance with the Administrative Process Act. This part does not apply to regulations exempted from the provisions of the Administrative Process Act (§ 9-6.14:4.1 A and B) or excluded from the operation of Article 2 of the Administrative Process Act (§ 9-6.14:4.1 C).

B. The failure of a person to receive a notice or copies of a document provided under these procedures shall not affect the validity of a regulation.

C. Anyone may petition the board for the adoption, amendment or repeal of a regulation. The petition, at a minimum, shall contain the following information:

1. Name of petitioner.
2. Petitioner's mailing address and telephone number.
3. Petitioner's interest in the proposed action.
4. Recommended regulation or addition, deletion or amendment to a specific regulation or regulations.
5. Statement of need and justification for the proposed action.
6. Statement of impact on the petitioner and other affected people.
7. Supporting documents, as applicable.

The board shall provide a written response to a petition within 180 days from the date the petition was received.

9 VAC 5-170-100. Public participation procedures.

A. The department shall establish and maintain a list consisting of people expressing an interest in the adoption, amendment or repeal of regulations. Anyone wishing to be placed on the list may do so by writing the department. In addition, the department, at its discretion, may add to the list any person, organization, or publication it believes will be interested in participating in the promulgation of regulations. Individuals and organizations may be periodically requested to indicate their desire to continue to

receive documents or be deleted from a list. Individuals and organizations may be deleted from the list at the request of the individual and organization, or at the discretion of the department when mail is returned as undeliverable.

B. Whenever the board so directs or upon its own initiative, the department may commence the regulation adoption process and proceed to draft a proposal according to these procedures.

C. The department shall use the participatory approach to assist in the development of the proposal or use one of the following alternatives:

1. Proceed without using the participatory approach if the board specifically authorizes the department to proceed without using the participatory approach.

2. Include in the notice of intended regulatory action a statement inviting comment on whether the department should use the participatory approach to assist the department in the development of the proposal. If the department receives written responses from at least five people during the associated comment period indicating that the department should use the participatory approach, the department will use the participatory approach requested. Should different approaches be requested, the director shall determine the specific approach to be used.

D. The department shall issue a notice of intended regulatory action whenever it considers the adoption, amendment or repeal of a regulation.

1. The notice of intended regulatory action shall include at least the following:

- a. A description of the subject matter of the planned regulation.
- b. A description of the intent of the planned regulation.
- c. A brief statement as to the need for regulatory action.
- d. A brief description of alternatives available, if any, to meet the need.
- e. A request for comments on the intended regulatory action, to include ideas to assist the department in the development of a proposal.
- f. A request for comments on the costs and benefits of the stated alternatives or other alternatives.
- g. A statement of the department's intent to hold at least one public hearing on the proposed regulation after it is published in the Virginia Register of

Regulations.

h. A statement inviting comment on whether the department should use the participatory approach to assist the department in the development of a proposal. Including this statement shall be required only when the department makes a decision to pursue the alternative provided in subdivision C 2 of this section.

2. The department shall hold at least one public meeting whenever it considers the adoption, amendment or repeal of a regulation unless the board specifically authorizes the department to proceed without holding a public meeting. In those cases where a public meeting will be held, the notice of intended regulatory action shall also include the date, not to be less than 30 days after publication in the Virginia Register of Regulations, time, and place of the public meeting.

3. The public comment period for notices of intended regulatory action under this section shall be no less than 30 days after publication of the notice of intended regulatory action in the Virginia Register of Regulations.

E. The department shall disseminate the notice of intended regulatory action to the public via the following:

1. Distribution to the Registrar of Regulations for publication in the Virginia Register of Regulations.

2. Distribution by mail to people on the list established under subsection A of this section.

F. After consideration of public input, the department may complete the draft proposed regulation and the supporting documentation required for review. If the participatory approach is being used, the draft proposed regulation shall be developed in consultation with the participants. A summary or copies of the comments received in response to the notice of intended regulatory action shall be distributed to the participants during the development of the draft proposed regulation. This summary or copies of the comments received in response to the notice of intended regulatory action shall also be distributed to the board.

G. Upon approval of the draft proposed regulation by the board, the department shall publish a notice of public comment and the proposal for public comment.

H. The notice of public comment shall include at least the following:

1. The notice of the opportunity to comment on the proposed regulation, the location where copies of the proposal may be obtained, and the name, address, and telephone number of the individual to contact for further information about the proposed regulation.

2. A request for comments on the costs and benefits of the proposal.
3. The identity of a locality particularly affected by the proposed regulation.
4. A statement that an analysis of the following has been conducted by the department and is available to the public upon request:
 - a. A statement of purpose: the rationale or justification for the new provisions of the regulation, from the standpoint of the public's health, safety or welfare.
 - b. A statement of estimated impact:
 - (1) Projected number and types of regulated entities or people affected.
 - (2) Projected cost, expressed as a dollar figure or range, to regulated entities (and to the public, if applicable) for implementation and compliance. In those instances where the department is unable to quantify projected costs, it shall offer qualitative data, if possible, to help define the impact of the proposed regulation. Qualitative data shall include, if possible, an example or examples of the impact of the proposed regulation on a typical member or members of the regulated community.
 - (3) Projected cost to the department for implementation and enforcement.
 - (4) Beneficial impact the regulation is designed to produce.
 - c. An explanation of need for the proposed regulation and potential consequences that may result in the absence of the regulation.
 - d. An estimate of the impact of the proposed regulation upon small businesses, as defined in § 9-199 of the Code of Virginia, or organizations in Virginia.
 - e. A description of provisions of the proposed regulation which are more restrictive than applicable federal requirements, together with the reason why the more restrictive provisions are needed.
 - f. A discussion of alternative approaches that were considered to meet the need the proposed regulation addresses, and a statement as to whether the department believes that the proposed regulation is the least burdensome alternative to the regulated entities that fully meets the stated purpose of the proposed regulation.

g. A schedule setting forth when, after the effective date of the regulation, the department will evaluate it for effectiveness and continued need.

5. The date, time, and place of at least one public hearing held in accordance with § 9-6.14:7.1 of the Administrative Process Act to receive comments on the proposed regulation. The public hearing may be held at any time during the public comment period and, whenever practicable, no less than 15 days prior to the close of the public comment period. The public hearing may be held in the location which the department determines will best facilitate input from interested people. (In those cases in which the department elects to conduct an evidentiary hearing, the notice shall indicate that the hearing will be held in accordance with § 9-6.14:8 of the Administrative Process Act.)

I. The public comment period shall close no less than 60 days after publication of the notice of public comment in the Virginia Register of Regulations.

J. The department shall disseminate the notice of public comment to the public via the following:

1. Distribution to the Registrar of Regulations for publication in the Virginia Register of Regulations.

2. Distribution by mail to people on the list established under subsection A of this section.

K. The department may publish a notice of the hearing and comment period in any newspaper as it deems appropriate.

L. The department shall prepare a summary of comments received in response to the notice of public comment and the department's response to the comments received. The department shall send a draft of the summary of comments to public commenters on the proposed regulation at least five days before final adoption of the regulation. The department shall submit the summary and the department response and, if requested, submit the full comments to the board. The summary, the department response, and the comments shall become a part of the department file and after final action on the regulation by the board, made available, upon request, to interested people.

M. If the department determines that the process to adopt, amend or repeal a regulation should be terminated after approval of the draft proposed regulation by the board, the department shall present to the board for its consideration a recommendation and rationale for the withdrawal of the proposed regulation.

N. Completion of the remaining steps in the adoption process shall be carried out in accordance with the Administrative Process Act.

9 VAC 5-170-110. Transition.

A. Regulatory actions for which a notice of intended regulatory action has been published in the Virginia Register of Regulations prior to May 16, 1994 shall be processed in accordance with Appendix E of VR 120-01 as revised by the emergency amendments in effect from June 29, 1993 to June 28, 1994, unless sooner modified or vacated or superseded by permanent regulations.

B. This part when effective shall supersede and repeal Appendix E of VR 120-01 as revised by the emergency amendments which became effective on June 29, 1993. Regulatory actions for which a notice of intended regulatory action has not been published in the Virginia Register of Regulations prior to May 16, 1994 shall be processed in accordance with this part.

PART V.
ENFORCEMENT.

9 VAC 5-170-120. Enforcement of regulations, permits, and orders.

A. As provided in § 10.1-1186(10) of the Code of Virginia, the director has independent authority to compel compliance with the Virginia Air Pollution Control Law, regulations of the board, permits, certifications, and case decisions. However, whenever the director has reason to believe that a violation of any provision of the regulations of the board or a permit or order has occurred, he may serve notice on the suspected violator on behalf of the board, citing the applicable provision of the regulations of the board, permit, or order and the facts on which the suspected violation is based. When acting on behalf of the board, the director may obtain compliance through one of the enforcement proceedings provided in subdivisions 1 and 2 of this subsection. Thus, the director may act on his own independent authority or on the authority of the board as delegated to him by this chapter.

1. The director may obtain compliance through administrative means. These means may be a variance, order, special order, control program, consent agreement, or another mechanism that requires compliance by a specific date. The means and the associated date shall be determined on a case-by-case basis and shall not allow an unreasonable delay in compliance.

2. The director may obtain compliance through legal means pursuant to § 10.1-1307.3, § 10.1-1316, or § 10.1-1320 of the Virginia Air Pollution Control Law.

B. Nothing in this section shall prevent the director from making efforts to obtain voluntary compliance through conference, warning or other appropriate means.

C. Orders, consent orders, delayed compliance orders, special orders, and emergency special orders are considered administrative means, and the board reserves the right to use these means in lieu of or to provide a legal basis for the enforcement of

administrative means approved by the director under subsection A of this section.

D. Case decisions regarding the enforcement of regulations, orders, and permits shall be made by the director or board. Case decisions of the director that are made pursuant to a formal hearing (i) may be regarded as a final decision of the board and appealed pursuant to 9 VAC 5-170-200 D; or (ii) may be directly considered by the board as provided in 9 VAC 5-170-200 G, with the review being on the record and not de novo with opportunity for oral argument. Case decisions of the director that are made pursuant to an informal fact finding (i) may be appealed to the board pursuant to 9 VAC 5-170-200 A or (ii) may be directly considered by the board according to 9 VAC 5-170-200 G.

9 VAC 5-170-130. Right of entry.

A. Whenever it is necessary for the purposes of the regulations of the board, the board or an agent authorized by the board may at reasonable times enter an establishment or upon property, public or private, for the purpose of obtaining information or conducting surveys or investigation as authorized by § 10.1-1315 or § 46.2-1187.1 of the Code of Virginia.

B. Upon the procurement of an inspection warrant signed by a judge of the circuit court whose territorial jurisdiction encompasses the property or premises to be inspected or entered, the board or an agent authorized by the board may enter any property or premises and conduct any inspection, testing, or collection of samples for testing required or authorized by state law or regulation in connection with the manufacturing, emitting, or presence of a toxic substance, as authorized by § 19.2-393 et seq. of the Code of Virginia.

PART VI. BOARD ACTIONS.

9 VAC 5-170-140. Variances.

A. Pursuant to § 10.1-1307 C of the Virginia Air Pollution Control Law, the board may in its discretion grant local variances to a provision of the regulations of the board after an investigation and public hearing. If a local variance is appropriate, the board shall issue an order to this effect. The order shall be subject to amendment or revocation at any time.

B. The board shall adopt variances and amend or revoke variances if warranted only after conducting a public hearing pursuant to public advertisement in at least one major newspaper of general circulation in the affected area of the subject, date, time, and place of the public hearing at least 30 days prior to the scheduled hearing.

C. The public participation procedures of § 10.1-1307.01 of the Virginia Air Pollution Control Law shall be followed in the consideration of variances.

9 VAC 5-170-150. Local ordinances.

A. Local ordinances shall be established and approved as follows:

1. The governing body of any locality proposing to adopt an ordinance, or an amendment to an existing ordinance, relating to air pollution shall first obtain the approval of the board as to the provisions of the ordinance or amendment. Except for an ordinance or amendment pertaining solely to open burning, the board shall not approve an ordinance or amendment which regulates an emission source that is required to register with the board or to obtain a permit pursuant to Virginia Air Pollution Control Law and the regulations of the board. The board in approving local ordinances will consider, but will not be limited to, the following criteria:

a. The local ordinance shall provide for intergovernmental cooperation and exchange of information.

b. Adequate local resources will be committed to enforcing the proposed local ordinance.

c. The provisions of the local ordinance shall be as strict as state regulations, except as provided for leaf burning in § 10.1-1308 of the Virginia Air Pollution Control Law.

2. Approval of a local ordinance shall be withdrawn if the board determines that the local ordinance is less strict than state regulations, or if the locality fails to enforce the ordinance.

3. If a local ordinance must be amended to conform to an amendment to state regulations, the local amendment will be made within six months. If the necessary amendment is not made within six months, the board may rescind its approval of the ordinance.

B. Local ordinances shall provide for reporting information required by the board to fulfill its responsibilities under the Virginia Air Pollution Control Law and the federal Clean Air Act. Reports shall include, but are not limited to monitoring data, surveillance programs, procedures for investigation of complaints, variance hearings, and status of control programs and permits.

C. Local ordinances are a supplement to state regulations. Provisions of local ordinances which have been approved by the board and are more strict than state regulations shall take precedence over state regulations within the respective locality. It is the intention of the board to coordinate activities among the enforcement officers of the various localities in the enforcement of local ordinances and state regulations. The board will also provide technical and other assistance to local authorities in the investigation and study of air pollution problems, and in the enforcement of local ordinances and state

regulations. The board emphasizes its intention to assist in the local enforcement of local ordinances. If a locality fails to enforce its own ordinance, the board reserves the right to enforce state regulations.

D. A local governing body may grant a variance to a provision of its air pollution control ordinance provided that:

1. A public hearing is held by the locality prior to granting the variance;
2. The public is notified of the application for a variance by advertisement in at least one major newspaper of general circulation in the affected locality and a major newspaper of general circulation in the state capital area at least 30 days prior to the date of the public hearing by the locality; and
3. The variance does not permit an owner or other person to take action that would result in a violation of a provision of state regulations unless a variance is granted by the board. The local public hearing required for the variances to the local ordinance and the public hearing required under state regulations may be conducted jointly as one proceeding.

E. This section shall not apply to the approval of local ordinances concerning open burning established pursuant to 9 VAC 5-40-5645 D.

9 VAC 5-170-160. Conditions on approvals.

A. The board may impose conditions upon permits and other approvals which may be necessary to carry out the policy of the Virginia Air Pollution Control Law, and which are consistent with the regulations of the board. Except as otherwise specified, nothing in this chapter shall be understood to limit the power of the board in this regard. If the owner or other person fails to adhere to the conditions, the board may automatically cancel the permit or approvals. This section shall apply, but not be limited, to approval of variances, approval of control programs, and granting of permits.

B. An owner may consider a condition imposed by the board as a denial of the requested approval or permit, which shall entitle the applicant to appeal the decision of the board pursuant to 9 VAC 5-170-200.

9 VAC 5-170-170. Considerations for approval actions.

Pursuant to the provisions of § 10.1-1307 E of the Virginia Air Pollution Control Law, the board, in making regulations and in approving variances, control programs, or permits, shall consider facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it, including:

A. The character and degree of injury to, or interference with safety, health, or the reasonable use of property which is caused or threatened to be caused;

- B. The social and economic value of the activity involved;
- C. The suitability of the activity to the area in which it is located; and
- D. The scientific and economic practicality of reducing or eliminating the discharge resulting from the activity.

PART VII.
DELEGATION OF AUTHORITY.

9 VAC 5-170-180. General Provisions.

A. In accordance with the Virginia Air Pollution Control Law and the Administrative Process Act, the board confers upon the director the administrative, enforcement, and decision-making powers as are set forth in this part. The board reserves the right to exercise its authority in any of the following delegated powers should it choose to do so.

B. The director is delegated the authority to act within the scope of the Virginia Air Pollution Control Law and the regulations of the board and for the board when it is not in session except for the authority to:

1. Control and regulate the internal affairs of the board;
2. Approve proposed regulations for public comment and adopt final regulations;
3. Grant variances to regulations;
4. Approve amendments to a policy or procedure approved by the board except as may be otherwise provided;
5. Appoint people to the State Advisory Board on Air Pollution;
6. Create local air pollution control districts and appoint representatives;
and
7. Approve local ordinances except those that concern open burning, as provided in 9 VAC 5-40-5645 D.

C. The board may exercise its authority for direct consideration of permit applications in cases where one or more of the following issues is involved in the evaluation of the application: (i) the stationary source generates public concern relating to air quality issues; (ii) the stationary source is precedent setting; or (iii) the stationary source is a major stationary source or major modification expected to impact on a

nonattainment area or class I area.

D. The director shall notify the board chairman of permit applications falling within the categories specified in subsection C of this section and the board chairman shall advise the director of those permits the board wishes to consider directly.

PART VIII. APPEAL OF BOARD ACTIONS.

9 VAC 5-170-190. General Provisions.

A. Except as provided in subsection B of this section, this part applies to the appeal of case decisions and other actions or inactions of the board.

B. Provisions of this part do not apply to the appeal of the promulgation of regulations or variances. Appeals of the promulgation of regulations and variances shall be pursued under Article 4 (§ 9-6.14:16) of the Administrative Process Act.

9 VAC 5-170-200. Appeal Procedures.

A. An owner or other party significantly affected by an action of the board taken without a formal hearing, or by inaction of the board, may request a formal hearing in accordance with § 9-6.14:12 of the Administrative Process Act, provided a petition requesting a formal hearing is filed with the board. In cases involving actions of the board, the petition shall be filed within 30 days after notice of the action is mailed or delivered to the owner or party requesting notification of the action.

B. Prior to a formal hearing, an informal fact finding shall be held pursuant to § 9-6.14.11 of the Administrative Process Act, unless waived by the named party and the board.

C. A decision of the board resulting from a formal hearing shall constitute the final decision of the board.

D. Judicial review of a final decision of the board shall be afforded in accordance with § 10.1-1318 of the Virginia Air Pollution Control Law and § 9-6.14:16 of the Administrative Process Act.

E. Nothing in this section shall prevent disposition of a case by consent.

F. A petition for a formal hearing or a notice or petition for an appeal by itself shall not constitute a stay of decision or action.

G. A party significantly affected by a decision of the director may request that the board exercise its authority for direct consideration of the issue. The request shall be filed within 30 days after the decision is rendered and shall contain reasons for the

request.

H. The submittal of the request by itself shall not constitute a stay of decision. A stay of decision shall be sought through appropriate legal channels.

I. The director has final authority to adjudicate contested decisions of subordinates delegated powers by him prior to appeal of decisions to the circuit court or consideration by the board.

HISTORICAL NOTES:

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